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Law, pliability and the multicultural city:

Documenting planning law in action

ABSTRACT: The urban realm is often depicted as a relational and unbounded place that needs to be governed through municipal laws designed to secure order. Focusing on the deployment of certain techniques central to planning – e.g. development control, zoning, change of use – in this paper we demonstrate that this order is contingent and that law struggles to keep pace with the multiplicity of the urban realm and the conflicts that arise from the diverse lives of those trying to live within a dense built environment. This means that planning law, like other forms of municipal law needs to be understood as less consistent and more pliable than many other forms of law, being shaped by complex inter-legalities that emerge contextually. In this paper we demonstrate this with reference to the resolution of urban land-use conflict in Sydney (Australia) showing how planning decisions need to exhibit pliability within the law to achieve outcomes that are sensitive to local contingency. In conclusion we suggest that attempts to provide certainty and consistency in municipal law are problematic given situated discretion is required to produce cities more open to difference and diversity.

KEYWORDS: legal geography, urban planning, amenity, locality, land use, multiculturalism

Introduction

Law is sometimes idealised as abstract, rational and reasoned, involving thinking through issues of justice and fairness to evolve principled ways of deciding and resolving conflicts. As Latour (2009) noted in his ethnography of the *Conseil D'Etat* this conception of the law carries through to the practices of law-making itself which - in its idealized form - happens in purified, learned spaces where there is opportunity for individuals to apply high-level reasoning free from contamination or distraction. Law, in effect, is idealized as *clean*. Moreover, it is idealized as eternal - or at least temporally consistent. Law's main function is the binding of social expectations: namely the fulfillment of social expectations that the law will not change from one day to another without legal justification. In theory, people can then rely on law to be consistent.

This is something that is particularly important in the context of cities. Law is depended upon to secure urban order and harmony ensuring that development does not impinge on the public interest and the balance between different potentially conflicting land uses is maintained. Without regulation - as many commentators have shown - cities would simply cease to function as spaces of production and consumption, work and play: it is the law that maintains the circulation of people, goods and things and ensures potential conflicts of land use are avoided or resolved (Layard 2010; Blomley 2013; Parizeau & Lepawsky 2015). The law also provides certainty to property owners about their rights to develop (Keenan 2010) and establishes the difference between public and private (Carr 2010). It is the law that guarantees residents that they will have particular levels of amenity and have legal recourse if their quiet enjoyment of property is compromised (Valverde 2005; Rutland 2015).

But herein lies the contradiction: the inherent complexity and changing nature of urban life means that legal definitions worked through in the abstract do not always seem so clear-cut when dealing with the actual situations that rise in cities characterized by super-diversity and cultural flux (Fincher et al 2014). The law has to adapt: it indulges in inconsistencies contradictions even paradoxes. However, it covers them up in its own peculiar legal way. Law is the perfect dissimulator: it manages to be both flexible *and* universal, adapting to local contingencies but retaining the illusion of being both universal and timeless (Philippopoulos-Mihalopoulos 2011). This provides a strong justification for the pursuit of urban legal geography: studying the way that law and space fold into one another in the city reveals the duplicity of the law and the way it *adapts* to changing urban circumstances according the particularities of locality. As Bartel et al insist:

Legal geography addresses ... the solipsistic claim the law makes for its separateness and supremacy in order to understand laws as embedded in co-constituted social and political life that is in turn emplaced ... Legal geography enacts a way for the heterogeneity, messiness, complexity, dynamism and emergent properties of people and place to challenge received orthodoxies of universality within law (Bartel et al 2013: 339).

Accordingly, law and space are both conceptualised as indeterminate but mutually constitutive. This implies the detail of the law and its differential effects across varied urban circumstances must be accounted for through a thorough and critical analysis of how law is being applied to a situation place or issue in question. This requires consideration not of

abstract principles but investigation of *law in action*: that is to say a consideration not of law in general - as if law exists as a single entity - but study of the way that laws are enacted differently in different jurisdictions, sometimes clashing with other laws including those enacted at other scales.

In this paper we draw on emerging ideas in legal geography that conceptualise law as a set of diverse practices, discourses and forms of knowledge which combine to produce urban space. But rather than focusing on the criminal laws which control the city and its citizens (i.e. the police powers enacted by the national state and enforced by locally-organised police forces) in this paper we focus on the use of a diverse range of micro-powers used by planners to maintain the orderliness of urban life. Here we are guided by the work of Marianne Valverde, who has suggested that a great deal of the work of controlling cities is not carried out by acting directly on the conduct of individuals through the enforcement of the criminal law but occurs via *municipal law*, a body of law concerned with purposively arranging environments so as to encourage certain forms of conduct and discourage others. In this paper we therefore take municipal law to refer to those laws concerning access to, control over, and enjoyment of spaces, buildings, parcels of land and other largely material entities (Valverde 2005: 36). Municipal law shapes space through development control (Keenan 2010), the licensing of premises (Valverde and Cirak 2003), the enactment of local by-laws (Blomley 2010) and environmental health regulation (Koch and Latham 2013), each of which is guided by particular rationalities and codified knowledges. As such municipal law is characteristically deployed by bureaucratic agents who have instrumentally-narrow concerns that are not necessarily cognisant of other bodies of law. This means that there is the

ever-present possibility that different administrators will reach different conclusions about the legality of particular uses of land unless there is explicit coordination (Hubbard 2015).

Inter-legality is thus characteristic of municipal law because of these sometimes competing bureaucratic modes of regulation. But municipal law is also inter-legal because of its multi-jurisdictional nature. Valverde (2016) addresses this when she notes that national or federal law impinges on land use and territorial dispute, albeit within the jurisdictional scope of local law, meaning that laws at multiple different levels can be invoked in land use controversies. Rights to property, freedom of expression or rights to development secured at the national level may then well clash with local laws that suggest particular land uses are not acceptable in a given context (Hubbard 2013). Uncertainty about whether local law has precedent over state or national law is often evident, with appeal decisions to courts at higher scales capable of undermining decisions made with reference to local perceptions of order and/or nuisance. But in other instances it is apparent that municipal regulators' decisions are hard to challenge, with local authorities or city governors empowered to make decisions about what is legal (or not) in a given context by national laws that grant considerable flexibility and discretion to local regulators.

The final important characteristic of municipal law that suggests it is inter-legal is that local understandings of land use (and the suitability of these) vary with context, history and custom. This is particularly the case in multi-cultural and post-secular cities where different moral and religious norms can clash with laws associated with the secular state (Humphrey 2007). If laws do not accurately represent cultural norms and

expectations on the ground they may fail the reality test of implementation: one size may not fit all. However, if laws are too reflexive or particular then they may undermine the expectation that law is certain and uniformly pertaining to all. This means that generic concepts or categories of land use determined or defined at a national level (or enshrined in national legislation) become more fuzzy as they are invoked in land use disputes: not so fuzzy that they begin to lose meaning but fuzzy enough that there is room for compromise and common sense views to take precedent.

Taken together, this inter-legality means that municipal law has a particular character that we describe in this paper. Here we describe municipal law as characterized by *pliability*, something evidenced in changing government policy, frequent judicial review and seemingly contradictory decisions. While all of this sits at odds with the predictability of (some) other forms of law we suggest that this is evidence of municipal law's inevitable inter-legality and that this is something that needs to be understood as normal, and perhaps even desirable. Indeed, more perhaps than many other legal disciplines, we argue that municipal law has the potential of becoming more pliable, not more codified and straightened. In the remainder of this paper we demonstrate this argument with reference to some of the key concepts regularly invoked in urban land use disputes, showing that these can never be fixed but need to be defined situationally. As such, we use an exploration of planning law in action in the context of Sydney (New South Wales) to make a series of more general points about the way that municipal law requires flexibility to promote a just, inclusive and cohesive society in which all can participate and where government services are accessible to all (see Fincher et al 2014 on planning for

multiculturalism). A distinctive feature of Sydney's urban environment in the early twenty-first century is its diversity of cultural expression and the provision of a multitude of places within it that provide opportunities for and foster a variety of cultural experiences. Indeed, Sydney has been hailed as a microcosm of the religious life of the world (Hartney 2004) and as one of the world's pre-eminent gay-friendly cities (Marsh and Galbraith 1995).

Enacting municipal law: planning and conflict

Urban planning - as an example of municipal law in action - claims jurisdiction over specific spaces and objects to administer justice (Philippopoulos-Mihalopoulos 2011). Unlike other areas of legalism there is a strong emphasis on concepts of justice that are more expansive than the social justice which stands as an enduring goal of the legal system for socio-legal scholars. While the notion of *spatial justice* is important here given it links questions of distributional and procedural justice to environmental justice (e.g. by consideration of the unequal burden placed on lower income and non-white communities by the siting of waste processing facilities in their neighbourhoods) the possibility for irreconcilability with some notions of social justice has long been noted (Bullard 2000; Pulido 1990). Here a number of key concepts provide a basis for judging claims to spatial justice: examples include purpose of use, amenity and locality. Each lies at the heart of a specific body of municipal law and is invoked on a regular basis in decision-making to justify particular arbitrations or judgments about what is right or wrong in a given circumstance. Given the intention of law to provide certainty,

these concepts nonetheless remain pliable with cases in different jurisdictions demonstrating that such concepts - while seemingly vital to the regulation of urban space - can never be defined with any sense of precision. In the remainder of the paper we explore these concepts further exploring why such uncertainty is inherent to municipal law as it seeks to resolve land use conflicts, questioning whether this is in any sense a problem.

Purpose of Use

One of the most important functions of municipal law has been to arbitrate over uses of land. As repeatedly established in case law municipal law is fundamentally concerned with the use of land not with the identity of the user.ⁱ A use of land in this context means the use of a premise for a particular *purpose*ⁱⁱ, something that is enshrined in land use classifications that characteristically distinguish between residential institutional business industrial and retail uses. Typically planning law suggests the nature of the use needs to be distinguished from the purpose of the use of land.ⁱⁱⁱ For example, whilst a parcel of land may contain a car park, access road, and building, the purpose of these uses imparted to the land might differ greatly depending on whether it is being used as (for example) a place of work, a space of workshop or a place of residence. Within planning law it has then been concluded that:

The characterization of the purpose of a use of land should be done at a *level of generality* which is necessary and sufficient to cover the individual activities transactions or processes carried on not in terms of the detailed activities transactions and processes.^{iv}

This means that the law is not particularly concerned with making further distinctions within particular categories of use lest this brings into play questions that are beyond the remit of planning *per se* (concerned as it is with environmental impacts and externalities). An example here is the retail use of a premise: in England and Wales, for example, planning law does not distinguish between its use as, for example, a grocers or bookshop nor between a religious bookshop or one selling pornographic books, though the latter might invoke another set of laws concerning obscenity. In NSW, however, slightly different assumptions are made about the legality of different land uses (e.g. places of worship, retail markets, boarding houses, single occupation homes, brothels) within zones designated as, for example, commercial, business or residential. In this way certain assumptions are made about the environmental externalities associated with each type of land use, with there being a broad anticipation that those uses within a given category share certain characteristics in terms of their environmental impact and nuisances associated with them.

In characterizing purpose of use at a level of generality planning law is an abstract codification and reproduction of space that imposes some homogeneity and hierarchically organises fragments of space according to classificatory logics. This characterization of purpose at a high level of generality nonetheless allows translation between legal abstraction and specific contexts (Delaney 1997). Such translations serve to tame the messiness and heterogeneity of everyday life and places, confining reality within a coldly objective system of legal calculations (Latour 2004). But at the same time this classification within broad categories can simultaneously serve the opposite purpose, allowing local regulators to

recognize difference within sameness and respond to local contingencies and circumstances, enacting flexibility in the process.

An example from Sydney underlines this. This case from the Land and Environment court (then heard in the NSW Court of Appeal) concerned the use of an existing premise previously used as a Presbyterian church as a mosque.^v Development consent had been given to the premises in 1954 for the purpose of use as a church, but after 1995 the premise was used as a mosque. The local consent authority – Bankstown City Council – sought orders in the LEC that the use of the premises for the purpose of a mosque was not authorized by the 1954 consent. Summarising the view of the Land and Environment Court, J Stein was satisfied that the term church did not extend in 1954 to envisage its use as a mosque. Key to J Steins’ judgment were a number of dictionary definitions which he concluded overwhelmingly indicated that the ordinary meaning of the term church was restricted to Christian establishments. At appeal J Mason nonetheless noted that ‘whilst a dictionary may offer a reasonably authoritative source for illustrating usage in context, they can never enter the *particular interpretative* task confronting a person required to construe a particular [*planning*] document for a particular purpose [*of use*].’^{vi} In the appeal J Mason opined that the purpose of the use of land should be considered at a greater level of generality and not the limited sense implied by the first appellants’ predecessor in title [*the Presbyterian church*]. A church as understood by J Mason was part of a more general and composite modern Australian and British purpose of use as a church, chapel or other place of public worship whose common feature was the notion of public worship. Moreover, J Mason argued that the purpose of use between the Presbyterian Church era and Mosque Era had not changed.

In considering this case we would argue that J Mason highlights the importance of the pliability of purpose of use in the law, noting that a more generalized *liberal* reading^{vii} of purpose of use - whilst not boundless^{viii} - should prevail. This idea - that the granting of permitted rights for a church can extend to encompass any place of worship suggests purpose of use is a broad and protean concept allowing the law to embrace the impact of individual activities, transactions or processes carried on upon the surrounding locality irrespective of whether the premise is of Christian or Islamic denomination. This decouples consideration of these environmental impacts from any moral or religious prejudice, potentially averting the forms of opposition to mosque-building which are grounded in Islamophobia rather than any objection relating to the material impacts of land use (Reeves et al 2009). Instead attention is focused on the way a premise might generate particular impacts through use. Here, J Mason notes that:

The actual use of a particular Christian church may alter significantly over time. Service times may change, congregations may swell and liturgies and other events may become noisier or otherwise affect the amenity of the neighbourhood.^{ix}

So while planning law seeks to classify land use to direct certain categories of land use towards (or away) from others to avoid major conflicts, there remains a certain flexibility to consider the nature of use as distinct from the purpose of use. Here planning law exhibits sufficient flexibility to embrace multiculturalism, reducing questions relating to the religious use of land to technical questions concerning amenity, not what is in keeping with the character of the area (recognising those living in a traditionally white/Christian area might mobilise arguments against religious premises associated with other faiths and ethnicities).

Amenity

Amenity is one of the fundamental yet most elusive concepts in planning law. Though regularly invoked as the basis for particular decisions (e.g. refusal of planning consent because a proposed land use would be detrimental to residential amenity), the concept is readily understood at an abstract level (e.g. it refers to the pleasantness of an area) but extremely difficult to operationalize in practice (Cooper 2010). Stein (2008) notes that only matters patently remote from a proposed development or that are unrelated to the externalities of the proposal are excluded as assessment considerations by environmental and planning law decision-makers.^x Those vague matters that are within scope are typically grouped within the catch-all pliable concept of amenity, making it both abstract and concrete at the same time. Amenity is then a socio-legal concept sufficiently indeterminate to include a wide range of real and perceived effects of development that might be considered important in any given context. Amenity is then a wide-ranging and flexible concept: ‘some aspects are practical and tangible, such as traffic generation, noise nuisance, appearance and even the way of life of the neighbourhood ... but others are more elusive such as the standard ... of the neighbourhood’.^{xi}

What is meant by amenity is accordingly not clearly defined despite its constant referencing within planning jurisprudence.^{xii} Stein (2008) notes that amenity is such a broadly encompassing notion that it is at times capable of incorporating public opinions that are ordinarily treated as matters inappropriate for planning law decision-makers to consider. He includes within this sphere matters of morality,^{xiii} particularly when it is suggested that a change of land use or a new development of a particular

type threatens to undermine local senses of place. But here there is evident flexibility in terms of the extent to which technical definitions of amenity extend to encompass perceptions and assumptions about potential impacts as opposed to actual impacts.

An example of this pliability is provided by the planning decisions surrounding sex service premises in NSW following the legislative decision to decriminalise prostitution in 1995. The subsequent shift of the regulation of sex premises from the criminal justice system to that of planning following the Disorderly Houses Amendment Act 1995 essentially stripped away any assumption that brothels are inherently disorderly or criminogenic (Prior et al 2012). Sex service premises in NSW have subsequently been located to minimize adverse physical impact such as noise disturbance and overlooking. In this aspect they are no different from other land uses in NSW when considering amenity.^{xiv} However, the reforming legislation provided additional restrictions on sex service premise not applicable to other land-uses: for example, brothels are not to be placed near or within view from a church hospital school or other place regularly frequented by children.^{xv} The inclusion of the former is telling here as while there is no necessary reason why a brothel as a place of work will have negative impacts on a neighbouring place of worship there is recognition here that the secular state's recognition of sex work as legitimate employment can be out of kilter with localised religious and moral sentiments which regard it as inherently sinful. In this regard the legislation explicitly stipulates that amenity in this case needs to take into account questions of proximity to and visibility from particular land uses, suggesting that questions of amenity might be legitimately connected to questions of offensiveness according to local understandings of what might disturb this (Prior and Crofts 2012). So

while there is no evidence that brothels cause demonstrable nuisance to neighbouring populations and premises (Hubbard et al 2013), planning deploys pliability here to enact a more pragmatic notion of amenity which encompasses *stigma nuisance* (see Nagle 2002).

Here the vague notions of near and within view within NSW legislation leaves the onus on local councils, in consultation with their communities, to create restrictions which they think are appropriate given that prostitution and sex work remain offensive to some. This vagueness has enabled local councils to generate a diversity of quantifiable planning principles for determining the nearness of sex service premise to specific facilities (e.g. next-door, 50m away, 75m away, 200m away, not within the same neighbourhood or same suburb) (Harcourt 1999). In this context planners are able to subsume local approaches to the management of offense under a lexicon of planning instruments, with these planning instruments being understood as the direct expression of an unspoken assumption of who might be offended within specific local communities. While there are dangers here of accentuating difference, this type of flexibility allows planners to recognise the specificities of a given situation and the particular anxieties experienced among particular communities about the presence of sex work premise: for example, there have been notable instances where the increasing Islamic population in an area has resulted in an increasing assumption that prostitution is ‘out of place’ in that neighbourhood (Kingston 2013).

Whilst this approach to maintaining amenity in neighbourhoods where sex service premises might be located has been supported since 1995 by the Land and Environmental Court (LEC),^{xvi} it is apparent that the Court has begun to question the scope of the link between proximity and

visibility and offensiveness. Recently, the Court approved the development application of a sex premise in an industrial area stating:

I accept that it is likely that the nature of the use of the building will become known to people in the area, including to young people who pass the site on their way to and from the playing fields. However, that knowledge of itself would not in my view have an adverse impact on the use of the playing fields or on the amenity of other land in the area or on the community generally.^{xvii}

Within this recent judgment the LEC has begun to question the assumption of the inherent offensiveness of sex premises and how that may be articulated. This unpicking of the link between offensiveness and visibility is significant as it highlights the ways that planning law can accommodate changing conceptions of residential amenity across time as well as space.

Conversely, however, objections within planning processes oftentimes seek to disguise moral objections to particular types of development within complaints about traffic car parking or more quantitatively calculable impacts. As such amenity concerns are presented as the key motivator for objection or appeal even though the objection is actually one about the users a land use might attract not its use *per se*. This was evident, for instance, in *Protect Penrith Action Group Inc v Penrith City Council and Ors*^{xviii}, where those opposing the use of a building as a place of public worship argued that consent should be refused until a detailed social impact assessment describing amenity impacts could be completed. It was further argued - albeit unsuccessfully - that this social impact assessment should be grounded on seven considerations, two of which

made specific reference to the nature of the use – a mosque - rather than the purpose of the use (as a place of public worship). In suggesting a need to gauge the nature extent and quantum of community concerns and/or the likely objections regarding the proposed mosque, J Moore noted that the social impact assessment was based on a fear of social otherness, highlighting that such considerations provided an impermissible taint to the notion of amenity.^{xix} This decision suggested that questions of faith or morality should not be allowed to taint the concept of amenity, something that is bounded in part by the ethical requirement of judicial agnosticism.^{xx}

These sorts of arguments have lead scholars including Villaroman (2012) to argue that amenity should be objectively and scientifically evaluated – i.e. universalised - via the typical legal-scientific methodology of measurement. However, in our view fixing amenity through objective and scientifically evaluated measurement reiterates the grand dissimulation of law as abstract and universal. Amenity is not fixed - nor should it be - as the example of planning for brothels suggests. Rather it is a reflection of the specific interests and values in play at a moment in time and in place. Amenity cannot be counted or converted into a statement of fact because to do so would mean that planning law loses some of its responsiveness and in this sense its ability to mediate in the messiness of the multicultural city. Moreover, static views about such concepts can end up serving historically dominant classes or groups and create social spatial and political barriers to more recently arrived land users (Bugg 2014). These are barriers that are inconsistent with the dominant view of planning laws as being (socially) just. Further, because the conflicts that planning law seeks to adjudicate are ultimately intractable and the planning process inherently subjective, any effort at objectively declaring

the amenity of a locality could not achieve the concurrence that is sought, or differentiate the moral from the technical. It would merely further law's dissimulation as aspatial, abstract and universal.

Locality

Across a number of jurisdictions planning decisions are often justified with reference to the relevant locality (Bowes 2014). The fact that the spatial boundaries of a locality do not necessarily need to be defined in advance but can be determined contextually with reference to the facts of a case can be a problem for applicants as they do not have any certainty about the extent of the locality their development is to be considered a part of. Yet the latitude this gives to planning officers is valuable if one considers that pre-determining the boundaries of localities neighbourhoods or zones appropriate to particular types of land use is neither sufficiently responsive to the changing nature of place, nor geared to the changing concerns of populations whose composition alters over time. This fact may be contrary to what Boyer (1986: 25) describes as a core purpose of planning - to create certainty by removing and separating conflicting land uses and dysfunctional districts that might impede solid investments in land - but it allows for strategic pliability (see Steele and Ruming 2012).

The ability of planning courts to recast the notion of locality within local planning is apparent in a series of appeals concerning land use decisions about gay sex-on-premises venues in Sydney in the 1990s.^{xxi} These appeals highlight the often controversial situations that planning is called to resolve in the here-and-now, with local frames of reference sometimes

in conflict with national legislative definitions. In the 1990s two development applications were submitted to South Sydney City Council for the Bodyline Spa and Sauna (a gay bathhouse): the first in 1992 the second in 1996.^{xxii} Both were denied. These applications were both subsequent to the decriminalisation of homosexuality in the 1980s and at a time when the matter of sex premises was being transferred from criminal law to environment and planning law in NSW (Prior 2008).

Central to the arguments for denying these development applications was the gay bathhouse's detrimental affect on the amenity of the locality in which it was to be placed. This extended beyond concerns of mere nuisance to the outrage to public decency that such an establishment would have on the locality's inhabitants.^{xxiii} Central to this argument was a narrative of neighbourhood decline, something particularly pronounced in the South Sydney City Council response to the 1996 application to locate the bathhouse in a small side street which transitioned from commercial premise at one end through to a primarily residential area. These narratives drew a picture of a once-pristine residential neighbourhood being increasingly besieged and polluted by the 'worst aspects of city life'.^{xxiv} The gay bathhouse that was the focus of the objections was identified as only the latest addition to the many existing sources of pollution that existed in the messy adjoining commercial strip accused of generating illegal parking, drug use, sex work, and violence in the locality. The narratives of decline that in part guided the original decision to deny the development were revived and debated in subsequent LEC hearings.^{xxv} Whilst there was some attempt to refer to statistical data to support these narratives, the evidence presented during the court hearings was largely anecdotal (Prior and Crofts 2012).

In both hearings serious attention was given by the Court to the impact of the bathhouses on the locality. Whilst the arguments for denying the application reinforced the narratives of neighbourhood decline, the appellants noted that the gay community was actually prevalent in that particular locality. Building on the evidence presented by an expert witness from the AIDS Council of NSW - who argued that gay bathhouses had become key sites for the dissemination of information on safe sex practices - in the first LEC case in 1992 the judge asserted that the gay bathhouse was not only important but crucial for the establishment and maintenance of the gay community that existed within the surrounding locality.^{xxvi} To reinforce this decision he noted that the South Sydney City Council Local Environmental Plan required consideration of the impact of the development on residents but did not define who a resident was. As a consequence he accepted that residents were not just the people who lived in the immediate vicinity of the proposed development but those living in a wider locality including the substantive gay community of 18,000-30,000 gay men known to live in the surrounding suburbs.^{xxvii} Accordingly the judgment recast the notion of locality allowing the gay bathhouse to be framed as an essential local amenity rather than one that contributed to a locality's decline.

Conclusion

Our brief exploration of the enactment of key concepts in planning law demonstrates the epistemic and ontological tension between the universality, certainty and predictability of planning law sought in general terms and the particularity, contingency and reflexivity required

in the multicultural city. The case studies demonstrate the ways that the urban realm and planning law intersect to produce particular outcomes that are not necessarily in keeping with repeatable interpretations of key concepts but can deliver what might be considered just and fair in the context of a city that has to be open to difference. Thus we have seen how the notion of purpose of use and amenity has been applied in a particular manner to deliver decisions rejecting theistically-biased opposition in NSW in some cases (e.g. to the development of sites of worship) but recognizing the legitimacy of moral or religious objections in others (e.g. to the development of brothels in proximity or view of such spaces of worship). Likewise, in the case of proposals for men's bathhouses in inner city Sydney the definition of a locality was interpreted much more widely than might normally be the case to provide sufficient room for manoeuvre so that past planning decisions could be reversed in the interests of promoting sexual rights and equalities.

This also underlines the role of the diversity and multiplicity of players defined here as legal actants. For Latour (2004) these actants and their authority are – along with every other thing including institutions, bodies, instruments, discourses and techniques – the carriers of legal integrity enrolled in finding the means to link texts to cases. It is through this network of actants and their ceaseless mediations, adjustments and adaptations that planning law is enacted. So in contrast to idealising a transcendent legal truth ('clean law') we follow Latour and others in suggesting that law is immanent, arising in the movement between word and world. More significantly though, and implicit in the case studies recounted above, we stress the need to attend to law's world-making practices as emerging inter-legally via an engagement with space, place and the urban environment. We are therefore wary of Latour positing one

collective or common world of *cosmopolitics* because we recognize the critically important particularity of place. In other words the city demands a law that is *pliable*. Here pliable means singular (i.e. it can be recognised as law in an abstract discursive way) but acentric (i.e. not originating in one central disciplinary construction unfolding onto various other disciplines) and immanent (i.e. always emerging from the particular assemblage in which it is required to intervene without pre-determined notions yet with a consistency of approach). Perhaps most crucially, our consideration of planning in the multicultural city suggests that it must be plural (i.e. always emerging from recognition of difference and not identity). In cities characterized by extremes of diversity and difference, planning law must then resist attempts at clustering things together on the basis of perceived commonality instead applying itself to the unearthing of difference in each and every case.

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NOTES

ⁱ Cripps J in *Moslem Alaway Society Society Ltd v Canterbury Municipal Council* [1983] 51 LGRA 79 at 82

ⁱⁱ *Shire of Perth v OKeefe* [1964] 110 CLR 529 at 534-535

ⁱⁱⁱ *Warringah Shire Council v raffles* [1979] 2 NSWLR 299; [1978] 38 LGRA 306

^{iv} *Royal Agricultural Society NSW v Sydney City Council* [1987] 61 LGRA 305
Emphasis added

^v *Bankstown City Council v House of Peace PTY LTD* ; followed by *House of Peace PTY LTD and Another v Bankstown City Council* Supreme Court of New South Wales [2000] NSWCA 44 also 106 LGERA 440

^{vi} 106 LGERA 440 at 441

^{vii} 106 LGERA 440 at 441 449-450 emphasis added

^{viii} Planning law in NSW is bounded in part by “judicial agnosticism” See 106 LGERA 440 at 446

^{ix} 106 LGERA 440 at 452

^x *Hospital Action Group Association Inc v Hastings Municipal Council* 1993 80 LGERA 190

^{xi} *Broad v Brisbane City Council* [1986] 2 Qd 317 326; 1986 59 LGRA 296 De Jersey J

^{xii} In an Australian context the Victorian Court of Appeal recently exposed the wide and unclear meaning of amenity in the case of *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008 19 VR 422](#)

^{xiii} *New Century Developments Pty Ltd v Baulkham Hills Shire Council* 2003 127 LGERA 253

^{xiv} *Martyn v Hornsby City Council* [2004] NSWLEC 614

^{xv} *Restricted Premises Act 1943* NSW s 17 5 a

^{xvi} See for example: *Martyn v Hornsby* n 45 ; *Joseph Vassallo v Blacktown City Council* [2004] NSWLEC 65

^{xvii} *Hall v Camden Council* [2012] NSWLEC 1003

^{xviii} [2011] VCAT 1968 14 October 2011

^{xix} See *Protect Penrith Action Group Inc v Penrith City Council and Ors* [2015] NSWLEC 159

^{xx} 106 LGERA 440 at 446

^{xxi} *Bodyline Spa and Sauna Sydney Pty Ltd v South Sydney City Council* [1992] 77 LGRA 432

^{xxii} South Sydney City Council Development Application For Gay Mens Social and Health Club 58a Flinders Street Darlinghurst as a Club U92-00152 1992 ; South Sydney City Council Development Application For Change of Use From Art Gallery/Yoga Centre To Gay Men’s Sex on Premises Venue/Art Gallery at 8-10 Taylor Street Surry Hills U96-00792 1996

^{xxiii} *Bodyline Spa and Sauna Sydney Pty Ltd v South Sydney City Council* n 77 436 South Sydney City Council Building Application For Alterations to Existing Club at 58a Flinders Street Darlinghurst as a Club 1992

^{xxv} See for example: *Bodyline Spa and Sauna Sydney Pty Ltd v South Sydney City Council* n 77 ; *Pride Holdings Pty Ltd v South Sydney City Council* NSW Land and Environment Court 8 April 1997

^{xxvi} *Bodyline Spa and Sauna Sydney Pty Ltd v South Sydney City Council* n 77 437-438

^{xxvii} *Ibid* 437-438